Supreme Court, U. S.
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JUL 20 1979
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1978

NO. 79-103

CLAUDE DORSY,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OF THE
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NO.

CLAUDE DORSY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Claude Dorsy, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on March 29, 1979.

OPINIONS BELOW

This case is reported at 592 F.2d 1189, a copy of the opinion is incorporated in the Appendix to this petition (App., p. A-1).

The judgment and commitment order entered by the United States District Court for the Southern District of Florida is unreported and appears in the appendix (App., p. A-2).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 29, 1979 (App. p. A-6). A timely petition for rehearing and/or suggestion for rehearing en banc was denied May 24, 1979 (App., p. A-7). See 597 F.2d 283.

This Court on June 18, 1979, entered an order extending time to file the petition for writ of certiorari to and including July 23, 1979 (App., p. A-8). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

WHETHER A *BRADY* MATERIAL REQUEST FOR ANY FEDERAL HOME LOAN BANK BOARD REPORT ON ANY BANK NAMED IN THE INDICTMENT WHERE THE REPORT DEALS WITH THE SUBJECT MATTER OF THE INDICTMENT IS SPECIFIC ENOUGH SO THAT A DISTRICT COURT'S DENIAL OF A MOTION FOR NEW TRIAL ON THE BASIS THAT THE PRECISE FHLBB REPORT (CONTAINING *BRADY* MATERIAL AND REVEALED SUBSEQUENT TO TRIAL) SHOULD HAVE BEEN TIMELY REQUESTED DENIES DEFENDANT A FAIR TRIAL MANDATED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V:

> "No person shall . . be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

In a superseding indictment the petitioner was charged with a conspiracy and sixteen substantive counts for causing individuals to make false statements on loan applications (to federally insured savings and loan associations) in violation of 18 U.S.C. §§ 2, 371, and 1014 (Vol. 1, pp. 194-210).

The petitioner was found guilty by a jury on the conspiracy count and thirteen substantive counts and received probation plus a fine (Vol. 3, p. 545).

Common to the conspiracy and all substantive counts was an allegation that the petitioner caused applications to be prepared by others containing a false statement that a down payment had been made by the borrower or that the applicant falsely stated that he had made a deposit of a certain sum toward the purchase of a condominium unit.[1]

It was alleged also in the substantive counts that one or more other type of false statement was caused to be made by the the borrowing applicant through the petitioner. The thrust of the government's case on all of the counts, however, was that a false statement concerning a down payment or a deposit of a certain sum towards the purchase of a condominium unit was caused to be made by the petitioner via the applications of the respective borrowers.

Although all of the applicants testified that the petitioner had never caused them to submit a false statement, the testimony of the government's key witness, Charles Summers, Senior Vice-President of the Dade Federal Savings and Loan

1. Petitioner was in the business of selling condominium units during the recessionary period of 1975, where condominium sales were being made without the requirement of a cash down payment.

Association (Miami, Florida) constituted the most telling evidence against the petitioner as to whether he believed that all the down payments or deposits listed in the applications were made in cash and that he would not have loaned any money if the down payments were not in the form of cash.[2]

In the types of loans being sought the Code of Federal Regulations does not require that a down payment or deposit be only in the form of cash. 12 C.F.R., § 545.6-1(a)(d)(i). Even the government conceded the law is that a down payment may be in the form of a cash equity or its equivalent. (Vol. 16, p. 41).

The trial court was repeatedly perplexed as to the meaning of the term "down payment" and "deposit" as seen by the District Judge's comment that the law at the time the crimes were committed is vague in terms of its applicability (1'st Supp. R., p. 3).

In turn, jurors were thoroughly confused as to whether the applicant could give deposit of value other than cash as illustrated by their note to the Court as to whether a down payment may be considered anything other than cash (Vol. 15, p. 105; Court's Exhibit 1).

While the initial indictment was pending against petitioner, Dorsy and another, Bridges, the defendant specifically moved on October 26, 1977, for the following documents:

> "Any portion of any report of examination by the Federal Home Loan Bank Board of any savings and loan association named in the indictment which report in any way deals with any of the condominium projects named in the indictment or the defendants, their alleged agents or representatives." (Vol. 1, p. 66)

2. Although Summers' institution, Dade Federal Savings, was not named in all of the counts, the issue as to whether the banks believed the listed down payment or deposit was only in the form of cash was common to all the counts.

Thus, the petitioner *specifically* requested any applicable FHLBB report which contained any exculpatory information as to any project described in the original indictment (Vol. 1, p. 66). On October 28, 1977, the government refused to give any FHLBB reports to the defendant relating to the savings and loan associations named in the indictment. On March 8, 1978, five days prior to trial, a superseding indictment was returned against Mr. Dorsy as noted, *supra.* So, again, on March 13, 1978, the defendant, after being reindicted, filed another request for any portions of any FHLBB reports which discussed any projects in the indictment that would disclose Brady material as well as any impeaching information (Vol. 1, p. 247-249). The petitioner's motion to furnish Brady material was granted on March 29, 1978 (Vol. 2, pp. 327-328).

On or about April 10, 1978, approximately two days before trial was to commence, petitioner, after receiving from the government Jencks material was led to the conclusion that exculpatory and impeachment type evidence existed in a FHLBB report on Dade Federal Savings and Loan Association. Accordingly, petitioner immediately asked for the report issued by the Board dealing with examination of Dade Federal (Vol. 2, 428, 429).

The government advised the District Judge in open court on April 12, 1978, that inasmuch as the FHLBB report was with the latter agency, a court order was necessary to obtain a copy from Washington. This representation by the govern-

ment was highly erroneous and prejudicial since the United States Attorney in Miami had the FHLBB letter and contents of the Dade Federal report for the previous eighteen months.

In an order dated April 13, 1978, the trial court ordered that the Dade report be provided for an *in camera* inspection (Vol. 2, p. 340). At the end of the trial, on April 20, 1978, the government finally provided copies of the Dade Federal report to the District Judge (Vol. 3, p. 488).[3]

Although the trial court ordered the submission of specific portions of the Dade Federal FHLBB report to be given to Dorsy on April 21, 1978, the aforesaid report containing exculpatory evidence and impeachment evidence was given to the defendant on May 5, 1978, more than two weeks following the conclusion of the trial (Vol. 3,pp. 488-491).

In the defendant's Supplemental Motion for a New Trial it was vigorously argued that the deliberate concealment by the government of the FHLBB documents containing exculpatory evidence and evidence that would impeach the witness Summers clearly prejudiced the defendant and constituted a flagrant violation of the defendant's Constitutional Rights to Due Process and a fair trial (Vol. 3, 569-575).

Notwithstanding, the District Judge stated in his order denying the motion for new trial that the existence of the Dade Federal Savings report was known or reasonably should have been known to the petitioner in advance of trial and to that extent a more timely request for discovery should have been presented to the Court. The trial judge's confusion as to the specificity required in describing the *Brady* material

3. This report consisted of two parts, viz., a 9-page letter from FHLBB dated 9/2/76 to the United States Attorney, and an excerpt from the report consisting of 4 pages (pp. 6-9) described as "III Dorsy-Bridges Condominium Projects".

sought will be discussed, *infra*.

REASONS FOR GRANTING THE WRIT

> A defendant is denied due process of law where a *Brady* material request is not a general one but specifically seeks any FHLBB report on any bank named in an indictment if the report deals with the subject matter of the indictment. It is impossible to be any more specific in a *Brady* material request where the materials sought, viz., FHLBB reports are confidential documents prepared following non-public hearings. Thus the District Court was placing an intolerable burden on requesting the petitioner to be more specific by seeking a particular FHLBB report and indicating the subject matter thereof.

Brady v. Maryland, 373 U.S. 83, holds that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt, irrespective of the good faith or bad faith of the prosecution.

Adverting to the words "upon request", defense counsel in *Brady* requested the extrajudicial statements made by Brady's accomplice, one Boblit. This Court held that the suppression of one of Boblit's statements deprived *Brady* of due process, noting specifically that *the statement had been requested* and that it was "material".

In *United States v. Agurs*, 427 U.S. 97, this Court admonished:

> "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable."

In the case, *sub judice*, notwithstanding the pretrial standing discovery order of October 6, 1977 to provide *Brady* material (first indictment); the pretrial standing discovery order of March 16, 1978 to provide *Brady* material (superseding indictment); and the specific request for any portion of any FHLBB report of any savings and loan association named in the indictment which report deals in any way with the condominium projects or the defendants named in the indictment, the government and the District Court declined to honor the spirit of *Brady* and *Agurs*.

Inasmuch as there were only four savings and loan associations named in the indictment, to wit: Dade Federal Savings & Loan Association, Franklin Federal Savings & Loan Association, First Federal Saving & Loan Association, and Florida Federal Savings & Loan Association, the action of the trial court and the government is unsurportable. [4]

Certainly the request for any FHLBB report containing Brady material concerning any of four banking institutions which dealt with the condominiums or defendants named in the indictment met the "specificity" test of Agurs. Yet, the the District Judge erroneously concluded that the request for the FHLBB report on Dade Federal was untimely (as the

4. Subsequent to the request for any FHLBB report containing Brady material, petitioner made a request for a FHLBB report "specifically" on Franklin Federal Savings and Loan Association, since a newspaper article made reference to said bank approving loans to the petitioner and his partner Bridges on condominium purchases without requiring a cash down payment. The District Judge granted the request for the Franklin Federal report, notwithstanding strenuous governmental objection.

FHLBB report on solely Dade Federal wasn't "specifically" requested until a few days before trial).

Such a narrow and incorrect construction of the term "specific request" by the trial court and, in turn, by the Fifth Circuit denied to the petitioner due process. Petitioner's request for any FHLBB report limited to four banks and to the subject matter of the indictment was not merely a general request for exculpatory matter; it was a specific and relevant request for "material" exculpatory evidence.

Materiality

Turning to the FHLBB report on Dade Federal it is found that said report was highly material in every sense of that term in that it supported the petitioner's contention that he was entirely candid in his dealing with Dade Federal.

On September 2, 1976 (eighteen months prior to trial) the FHLBB sent a letter addressed to the U.S. Attorney in Miami concerning possible violations of 18 U.S.C. §§ 2, 371, 1001, and 1014 involving Dorsy-Bridges condominium projects which included contents of the FHLBB report on Dade Federal. This letter (and in particular the FHLBB report) had its genesis in an FHLBB investigation of Dade Federal Savings and Loan Association. [5]

Exculpatory information contained in the letter and contents of the report reveal that refurbishing credits, rental credits, lease-option agreements and other credits were used as a down payment without the need for a cash outlay by the purchaser (Letter of September 2, 1976, p. 5).

5. See footnote #3, *supra*.

As to the report itself there was impeachment evidence that could have been effectively utilized by petitioner's skilled defense counsel on cross-examination of one of the government's key witnesses, Charles Summers, Senior, Vice-President of Dade Federal Savings and Loan Association. On behalf of the government, Mr. Summers testified (i) that he believed that all of the down payments on the applications were in fact made in cash and (ii) that he would not have loaned any money whatsoever on the Santona condominium project if the down payments were not in the form of cash. This same banker, who made a highly respectable appearance for the government, was found by the FHLBB in its report on Dade Federal concerning the Dorsy-Bridges condominiums to be personally loaning sums of money to one James Pion. This is of special significance inasmuch as the latter was the mortgage broker who brought all three Bridges-Dorsy projects to Dade Federal and presented them to Summers.

Additionally, the report in the government's possession for more than eighteen months prior to trial reflected some question as to whether there was a fee-splitting arrangement between Summers and Pion. The report stated that Summers made personal loans to Pion and that Summers received repayment of the loans from Pion through Pion's receipt of his commission for the placement of the Bridges-Dorsy Santona condominium project with Dade Federal. [6]

This same report stated that one loan by Summers of $2,000 to Pion could only be repaid by commissions earned by Pion on the Santona deal approved by Summers. The report concluded that Pion's confirmed financial distress made

6. In this regard, the report clearly found no connection with Dorsy or Bridges as far as Pion's commission for the placement of the Santona Condominium loans with Dade Federal through Summers.

Summers' conflict more pronounced since a loan payment was possible only if Pion could generate brokerage fee income. This latter finding was of such great significance to the FHLBB that the report on Dade Federal concluded that this conflict should be cited in the notice of charges against the latter institution.

The FHLBB report raised serious doubts about Summers credibility, honesty and integrity (Excerpt of Report, pp. 8-9). The FHLBB was apparently concerned about Summers and Pion, the mortgage broker, splitting fees. *Ibid.* It is respectfully submitted that since the letter from the FHLBB on the Dorsy projects as they involved Dade Federal and reference to contents of the Dade Federal report concerning the same projects with the exculpatory and impeaching evidence was available to the government since September 1976, said evidence was concealed or there was negligence by the government in overlooking same.

Petitioner was deprived of due process because the District Judge committed a grave Constitutional error in failing to grant his *Brady* request of any FHLBB report for the information sought met the requirement of specificity under the *Agurs* decision. Further, it was axiomatic that petitioner could not have been any more specific since the FHLBB reports are confidential and prepared after secret hearings.

CONCLUSION

Based upon the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

Richard M. Gale
924 Biscayne Building
19 West Flagler Street
Miami, Florida 33130

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Writ of Certiorari have been mailed to the Solicitor General, Department of Justice, Washington, D.C. 20530, this 19th day of July, 1979.

Richard M. Gale

APPENDIX A

OPINION OF FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-5423

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

CLAUDE DORSY,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(MARCH 29, 1979)

Before TUTTLE, TJOFLAT and HILL, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F. 2d 966.

APPENDIX B

JUDGMENT AND COMMITMENT, USDC, So. Dist. of Fla.

UNITED STATES DISTRICT COURT for
United States of America vs. Southern District of Florida
DEFENDANT CLAUDE DORSY
Docket No. 77-440-Cr-SMA

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date June 26, 1978.

COUNSEL	WITH COUNSEL: F. Lee Bailey, Esq.; Kenneth J. Fishman, Esq.; & Gerald Kogan, Esq.
PLEA	NOT GUILTY.
FINDING & JUDGMENT	There being verdict of GUILTY. Defendant has been convicted as charged of the offense(s) of conspiracy to file false credit applications with federally insured savings and loan associations, all in violation of Title 18, United States Code, Section 372, as to Count 1; and knowingly and willfully causing to be made and filed false credit applications in connection with mortgage loan applications to various federally insured savings and loan associations, all in violation of Title 18, United States Code, Sections 1014 and 2, as to Counts 2 through 14 each respectively.

SENTENCE OR PROBATION ORDER	The court asked whether defendant had anything to say why judgment should not be prounounced.Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of as to Ct. 1 imposition of sentence of confinement be and the same hereby is withheld and the defendant is placed on probation with this Court for a period of TWO (2) YEARS under the Standing Conditions of Probation as defined by this Court's Order entered August 1, 1964. It is further ORDERED that the defendant pay a fine unto the United States of America in the sum of SEVEN THOUSAND FIVE HUNDRED ($7,500.00) DOLLARS. Defendant is to stand committed until said fine is paid. It is further
SPECIAL CONDITIONS OF PROBATION	ORDERED that as to each of Counts 2,3, 4,5,6,7,8,9,10,11,12,13 & 14, imposition of sentence of confinement be and the same hereby is withheld and the defendant is placed on probation with this Court for a period of TWO (2) YEARS as to each Count. It is ORDERED that each period of probation as to Counts 2,3,4,5,6,7,8,9,10, 11,12,13 & 14 are to run concurrently with each other and concurrently with the period of probation imposed as to Count 1. It is further

ORDERED that the defendant shall pay a fine unto the United States of America in the sum of ONE THOUSAND ($1,000.00) DOLLARS as to *each* of Counts 2,3,4,5,6,7, 8,9,10,11,12,13 & 14. TOTAL FINE TO BE PAID IS TWENTY THOUSAND FIVE HUNDRED ($20,500.00) DOLLARS.

The defendant shall have ten (10) days from June 26, 1978, in which to either file a notice of appeal with the appropriate supersedeas bond or pay the initial SEVEN THOUSAND FIVE HUNDRED ($7,500.00) DOLLARS fine.

ADDITIONAL CONDITIONS OF PROBATION — In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT — The court orders commitment to the custody of the Attorney General and recommends,

RECOMMENDATION — It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed by: s/ Sidney M. Aronovitz
U.S. District Judge Date 6/28/78

APPENDIX C

JUDGMENT OF THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130
Telephone 504-589-6514
Office of the Clerk

June 1, 1979

Mr. Joseph I. Bogart, Clerk
U. S. District Court
P. O. Box 010669
Miami, FL 33101

NO. 78-5423 - UNITED STATES OF AMERICA vs. CLAUDE DORSY

(Dist. Ct. No. 77-440-CR-SMA)

Dear Sir:

( ) Enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

(xx) Enclosed is a certified copy of the Rule 21 Decision in the above case issued as and for the mandate.

( ) Having received from the Clerk of the Supreme Court a copy of the order of that court denying certiorari, I enclose a certified copy of the judgment of this Court in the above

case, issued as and for the mandate.

( ) We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

( ) Copy of the Court's opinion.

(xx) Opinion record on appeal or review. (16 vols., 1 suppl.)

(xx) Original exhibits. (1 box & 1 flt. pkg. - returned under separate cover)

( ) Bill of Costs approved by this Court.

Very truly yours,

Edward W. Wadsworth, Clerk

By: s/ Brenda Hauck
Deputy Clerk

enc. (LETTER ONLY)
cc: Messrs. Kenneth J. Fishman
F. Lee Bailey
Ms. Marsha L. Lyons
Mr. Richard M. Gale

APPENDIX D

DENIAL OF PETITION FOR REHEARING

United States Court of Appeals
Fifth Circuit

Edward W. Wadsworth
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

Office of the Clerk

May 24, 1979

TO ALL PARTIES LISTED BELOW:

NO. 78-5423 - U.S.A. v. CLAUDE DORSY

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
Edward W. Wadsworth, Clerk

By: s/ Sally Hayward
Deputy Clerk

cc: Messrs. Kenneth J. Fishman
F. Lee Bailey
Mr. Richard M. Gale
Ms. Marsha L. Lyons

APPENDIX E

ORDER OF SUPREME COURT EXTENDING TIME

SUPREME COURT OF THE UNITED STATES

NO. A-1091

CLAUDE DORSY,
Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner;

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby extended to and including July 23, 1979.

/s/ Lewis F. Powell, Jr.
Associate Justice of the
Supreme Court of the United
States

Dated this 18 day of
June, 1979